No. 12,511

IN THE

United States Court of Appeals

For the Ninth Circuit

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY, *Appellants,*

vs.

PAUL MALLONEE, et al., *Appellees.*

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., *Appellants,*

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, et al., *Appellees.*

On appeal from the District Court of the United States for the Southern District of California, Central Division.

REPLY BRIEF FOR APPELLANTS.

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FILED

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REPLY BRIEF FOR APPELLANTS.

Eight briefs, totaling over 600 pages in length, have been filed by appellees, seven of them by the Long Beach Association and affiliated interests, and one by the former Los Angeles Bank and certain of its former member associations. In the interest of

brevity, the brief of the Association will be identified as "Ass'n Br."; that of the Association shareholders as "Sh. Br."; that of appellee Wallis as "Wal. Br."; that of Turner as "Tr. Br."; that of the so-called "Home Owners" (borrower-intervenors) as "HO Br."; that of the Wilmington Association as "Wil. Br."; that of Title Service Co. as "T. S. Br."; and that of the Los Angeles Bank as "L. A. Br."

The appellants' opening brief will be identified as (Op. Br. 4):

SCOPE OF REVIEW ON APPEAL FROM INTERLOCUTORY INJUNCTION.

All parties are agreed that, on review of an interlocutory injunction, the appellate court must decide both whether the pleadings set forth any claim for relief and whether the trial court had jurisdiction of the subject matter and the parties involved. Thus the brief of the Association shareholders expressly states (Sh. Br. 4):

> "On an appeal from a Preliminary Injunction the Appellate Court need decide only three issues:
>
> First: Did the trial court have jurisdiction?
>
> Second: Were there allegations in the pleadings sufficient to sustain any relief?
>
> Third: Was the issuance of a Preliminary Injunction an abuse of the trial court's discretion?"

The Association's brief takes the same position (Ass'n Br. 56).

Accordingly, it is unnecessary to consider whether any objection to the maintenance of the action is "jurisdictional" or "substantive", and all such objections may be described as the failure "to state a claim for relief within the jurisdiction of the court below".

As the injunction on appeal was issued to restrain the maintenance of a separate proceeding in another forum, it must also be shown that there is an identity of issues between the action pending below and the proceedings enjoined. *Long v. Stites,* 63 Fed. (2d) 855; *Empire Trust Co. v. Brooks,* 232 Fed. 641. Appellees by implication admit as much, in asserting that the grounds of the Board order in controversy directly affect matters in issue before the court below (Ass'n Br. 43; L. A. Br. 36).

The questions to be considered on appeal from this interlocutory injunction are thus fourfold:

First. Is the action one within the jurisdiction of the court below?

Second. Do any of the pleadings state a claim for relief?

Third. To the extent, if any, that any of the pleadings state a claim for relief within the jurisdiction of the court below, is there an identity of issues between such claim and the proceeding restrained by the injunction on appeal?

Fourth. Apart from the foregoing, was the injunction improperly granted?

The seven briefs filed by the Long Beach Association and affiliated interests are directed principally to the first question, and primarily as it relates to the jurisdiction of the court below over the persons of the defendant and not of the subject matter of the action.

In none of the seven briefs is there a word of argument to show that the pleadings allege any ground for relief on the merits. The plaintiff shareholders make the bald assertion that "the complaints as amended state causes of action", supported only by a mere citation of the pleadings without argument or authority (Sh. Br. 9). The Association is content to say that "pleadings stating claims for relief have already been the subject of final judgments by the court below, the protection of which final judgments was one of the grounds for the issuance of the Preliminary Injunction" (Ass'n Br. 56). Indeed, the only theory ever advanced by these appellees throughout the entire proceeding is the one first announced by Judge Hall (22 R. 10294), and adopted by appellees (10 R. 4402), that "it is a fundamental rule that fraud vitiates from the beginning a transaction". The appellants' answer, among others, that neither "malice" nor "fraud" as pleaded by appellees affords any basis for recovery of money damages or the other remaining relief prayed for, set forth at length in our opening brief (Op. Br. 36-54), is nowhere even discussed by appellees.

On the question whether there is any identity of issues between the action pending below and the ad-

ministrative proceeding enjoined, appellees rest on a mere assertion (Ass'n Br. 43). The alleged identity of issues was sought to be supported in the court below by findings describing in detail the issues allegedly remaining for determination in the court below, including the "question of the validity of all the acts performed by said conservator during the period of his possession" (18 R. 8253-5), but the 309-page brief of the Association is wholly silent on the subject, possibly with the object of avoiding any argument on the merits of the complaints.

THE QUESTIONS PRESENTED ON THIS APPEAL AND APPELLATE RECORD PERTAINING THERETO.

The issues on this appeal are few and narrow in scope.

Nothing need be considered other than the substantially identical shareholders' complaint and Association cross-claims.

The so-called cross-claims in "interpleader" of appellees, Title Service Company, Wallis, and Turner, are plainly impermissible collateral attacks (see Op. Br. 75-6). The same is true of the Association's attempted interpleader of the San Francisco and Los Angeles Banks to determine the ownership of $6,300,000 of notes, evidencing a loan from the San Francisco Bank to the Association during the conservatorship, and collateral securing the same (see infra p. 27). The proceedings in intervention by "Home Own-

ers" (borrowers from the Association) are not only subject to the same objection but have been disposed of by final judgments not here in controversy, which judgments, however, expressly reserved all issues "without prejudice" as to all other parties (Op. Br. 85). There is obviously no basis for the Association's attempt to interplead its own shareholders and the Federal Savings and Loan Insurance Corporation to determine the amount of insurance premiums payable to the latter (Op. Br. 77-8). The separate actions of the ten "Northern Associations" in the United States District Court for the Northern District of California and of the two Association shareholders in a California State Court, as well as the proceedings below to enjoin those actions (Op. Br. 19-20), add to the length of the record but nothing to the issues on this appeal. And the proceeding to show cause why the San Francisco Bank should not be dissolved by vote of its Association shareholders, in which 300 member institutions were served, hardly merits serious consideration; the only right to vote conferred on the Bank's shareholders is the *statutory* right to elect a specified number of directors (Op. Br. 15, n. 18; 12 U.S.C. 1427; Op. Br. App. A, 119).

The issues raised by the shareholders' complaint and Association cross-claims are, in turn, narrow in scope. Before the Board Order No. 388 of January, 1948 and the ensuing court order of January 23, 1948, directing the return of the Association to its private

management, the objects of the complaint and Association cross-claims were, first, to secure the return of the Association and its assets, free from alleged clouds on title, and second, to nullify each and every transfer, contract or other act of the conservator and to recover damages therefor, through the medium of a purported accounting.[1] The first is no longer in issue, the Board having terminated the conservatorship. It is argued, to be sure, that the former conservator has not returned all of the Association's assets (Sh. Br. 19-20), but as it is nowhere alleged (and could not be) that he personally pocketed any of such assets during the conservatorship or on its termination, what is meant is merely that he allegedly made unlawful transfers or other disposition of the Association's assets and unlawfully incurred obligations on the Association's behalf.

Were it permissible to consider each and every act of the Conservator throughout the period of the conservatorship, none of the remaining relief prayed for could be granted. The order appointing the Conservator, having been made in the exercise of the Board's jurisdiction, was valid and enforceable until duly set aside or terminated (Op. Br. 36-42), and upon the termination of the conservatorship none

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[1]Both the complaint (Count VI, 7 R. 3064) and Association's cross-claims (Count IV, 7 R. 3309) also contain allegations concerning the validity of the administrative orders of March 29, 1946, dissolving the Los Angeles Bank, none of which states any claim for relief within the jurisdiction of the court below. See *infra*, p. 33.

of the obligations incurred by the Conservator on behalf of the Association may be set aside, and no money damages may be recovered from appellants, notwithstanding the allegations of "malice" or "fraud" (Op. Br. 42-54). All such relief is barred for the further reason that the Association failed to exhaust its administrative remedy within the time available therefor during the conservatorship; the courts cannot make an independent determination of the question whether the Conservator should have been appointed, for to do so would "substitute the courts for the administrative tribunal" (Op. Br. 56-58, see also, *Slocum v. Del. Lack. & W. R. R.*, 339 U.S. 239, 242-244; *Order of Ry. Cond. of America v. Southern Ry. Co.*, 339 U.S. 255; *Order of Ry. Cond. of America v. Pitney,* 326 U.S. 561, 566-7). The order appointing the Conservator, moreover, if reviewable at all, which we deny, is valid on the admitted facts (Op. Br. 59-71).

Any attempt to nullify the acts of the Conservator or to recover damages therefor, however, must be confined to the brief interval before opportunity for administrative hearing was accorded. Obviously, any action or damage complained of which occurred thereafter was susceptible of correction by an administrative remedy ignored by appellees, and cannot now be questioned in the courts (see Op. Br. 56-7). At most, therefore, this action concerns claims allegedly arising out of temporary operation of the conservatorship before hearing was afforded, claims based on,

(1) a run of $10,000,000 allegedly caused by "statements" (7 R. 2984-5, 3220-5) of the Conservator making false charges against the Association's management, a class of damage for which traditionally there is no redress, whether the communications complained of are those of a court, grand jury, or a federal administrative agency. (*Ewing v. Mytinger & Casselberry,* 339 U.S. 594; *Glass v. Ickes,* 117 F. (2d) 273);

(2) a loan of $7,300,000 from the San Francisco Bank necessary to pay such withdrawals, secured by pledge of the Association's notes and trust deeds and other assets, which caused no actual injury to the Association and which could in any event have been eliminated by successful resort to the administrative remedy afforded (Op. Br. 5, 6-8);

(3) alleged clouding of title by means of such loan and pledge, which cloud, however, was really created by the Title Service Company's collateral attack on the order appointing the Conservator.

Plainly, claims based on such "temporary interference" with the Association's business (*Ewing v. Mytinger & Casselberry, supra,* at 601) state no claim for relief within the jurisdiction of the court below because,

(1) the administrative determination of probable cause for appointing the Conservator in advance of hearing is not reviewable for any pur-

pose, but if reviewable is adequately supported by the admitted facts (Op. Br. 56, 59-67; see also *Ewing v. Mytinger & Casselberry, supra*);

(2) such determination, if erroneous or even malicious, affords no basis for the recovery of money damages or to nullify the Conservator's transactions during the period of his appointment (Op. Br. 42-54);

(3) the claims are barred for failure to invoke the administrative remedy, both because judicial review may be obtained only in accordance with the procedure duly prescribed by law and because the injuries complained of were susceptible of administrative correction (Op. Br. 54-59; see also *RFC v. Lightsey,* 185 F. (2d) 167).

Other damages are alleged, to be sure, including the making of some $4,000,000 of improvident G. I. loans, but it is nowhere alleged—and could not be—that any such loans were made or damage caused before opportunity for administrative hearing was afforded. The Association complains that some $73,000 to $160,000 of the Association's funds were used by the Conservator to pay his own salary and administrative expenses (Ass'n Br. 275), but none of appellees have the temerity to assert in their verified pleadings that any of this sum was actually expended until long after opportunity for administrative hearing was afforded. The principles which preclude mulcting the Conservator in damages or nullifying his acts prior to the

termination of the conservatorship, moreover, preclude recovery on any of the grounds alleged in any event (Op. Br. 34-54).

The appellees also boldly assert that a further remaining object of the Mallonee action is the making of "a permanent injunction forever restraining the appellant-defendants from *ever* unlawfully or improperly interfering" with the elected management of the Association (Sh. Br. 20) (italics supplied). A sufficient answer is that the nonresident Board members are indispensable parties to the granting of such personal relief and have not been duly served (*Williams v. Fanning,* 332 U.S. 490; *Daggs v. Klein,* 9 Cir., 169 F. (2d) 174; Op. Br. 71-80; see *infra,* p. 40). The conclusive answer, however, is that by reason of well established limitations on judicial review (if any be available), any injunction which might be issued in the pending action would in no wise bar future administrative action supported by additional evidence (*Hormel v. Helvering,* 312 U.S. 552; *Ford Motor Co. v. National Labor Relations Board,* 305 U.S. 364), and that, by reason of settled limitations on injunctive relief generally, would not control administrative action based on any new facts or conditions (*Countee v. U. S.,* 9 Cir., 112 F. (2d) 447; *Blair v. Comm. of Internal Revenue,* 300 U.S. 5). A further objection, if any be needed, is that no such injunctive relief against future administrative action could ever be granted until the available administrative remedy had first been exhausted.

This disposes of the first six counts of the amended complaint and cross-claims and all other supplemental pleadings of plaintiffs and the Association in the Mallonee action. It likewise disposes of any claim based on the seventh count of both the first amended complaint (7 R. 3084) and the amended Association cross-claims (7 R. 3330) for an equitable accounting. The finding of the court below "that each of the various items of such accounting are affected by the alleged liability of various defendants and cross-defendants on issues of the litigation" (18 R. 8237 n.) is unfounded. No liability may be imposed for the disposition of the Association's assets or the incurring of liabilities on the Association's behalf in the exercise of the Conservator's discretionary functions (Op. Br. 42-54). At most, therefore, the Conservator may be required to return the assets entrusted to him or the proceeds of any disposition thereof, subject to any liabilities incurred by him on the Association's behalf, and to make a detailed statement of the assets originally entrusted to him and his disposition thereof (*Lucking v. Delano,* 122 F. (2d) 21, 29).

There is, however, no identity of issues between a proceeding to enforce such obligations and those involved in the proposed Board hearing, since the Conservator's failure, if any, to perform such obligations could in no wise be attributed to the order originally appointing him, or to the alleged falsity of the grounds assigned for his appointment. Assuming, therefore, that a proceeding to enforce such obliga-

tions is maintainable in the court below, it affords no basis for the injunction on appeal.

An accounting proceeding even for such limited purpose, however, is not maintainable in the court below at all. As there is no allegation that the Conservator personally pocketed any of the Association's assets during the period of his appointment or on the termination thereof, it must be assumed that he returned all of the assets entrusted to him, or the proceeds thereof, in view of the presumption of official regularity (*Smith v. U. S.*, 32 F. Supp. 657; *Oakley County Club v. Long,* 325 Mass. 109, 89 N.E. (2d) 260; see also *United States v. Chemical Foundation,* 272 U.S. 1; *Procter & Gamble Co. v. Coe,* 96 F. (2d) 518). And the remaining obligation of the Conservator to make a detailed written report is enforceable only by administrative proceedings (Op. Br. 49, n. 9).

Appellees simply ignore most of these contentions and offer no tenable answer to the others. Thus, on the plainly unwarranted assumption that appellants "base their claim to immunity (from money damages) on the ground that the sovereign is immune to suit" (Ass'n Br. 205), appellees invoke decisions holding merely that consent to suit against government corporations is a waiver of the sovereign's *jurisdictional* immunity from the normal procedural incidents of suit, including garnishment and taxation of costs (*FHA v. Burr,* 309 U.S. 242; *RFC v. Menihan,* 312 U.S. 81), or that an action to recover property wrong-

fully withheld, without any claim for money damages, is not a suit against the United States (*Land v. Dollar,* 330 U.S. 731), or that the sovereign's consent to suit against a government corporation extends to actions sounding in tort as well as in contract, a decision rendered in an action based on negligent exercise of a ministerial non-discretionary function in the physical handling of property (*Keifer v. RFC,* 306 U.S. 381). Appellees do not trouble to cite or discuss *Spalding v. Vilas,* 161 U.S. 483, *Gregoire v. Biddle,* 177 F. (2d) 579, or any of the other authorities upholding a *substantive* immunity from money damages by reason of erroneous or even malicious exercise of a discretionary administrative function, or those applying such substantive immunity to "sue and be sued" government corporations (*Adams v. Home Owners' Loan Corp.,* 107 F. (2d) 139; *Atchley v. Tennessee Valley Authority,* 69 F. Supp. 952).

In truth, appellees seek to foreclose all argument on the twofold ground that the Board "confessed judgment" in terminating the conservatorship and that all prior orders of the court below are *res judicata.*

There is plainly no merit in the contention (Ass'n Br. 78-80) that the Board, by terminating the conservatorship in January, 1948, and directing the Conservator to file an accounting, thereby "confessed judgment as to many of the then pending issues of the litigation" and intended "to submit to the court all issues not abandoned by the confession of judg-

ment'' (Ass'n Br. 78-79). The Board order, although it afforded some of the same relief prayed for in the complaint (Ass'n Br. 80), was made in conformity with long established Board regulations contemplating the termination of a conservatorship and the filing of an accounting by the Conservator without regard to litigation (see Op. Br. 17, 48, 49, n. 9, App. B 161, 164). It contains no findings whatever, much less a finding that the original appointment was unwarranted; had such findings been made, however, they would have afforded no basis for imposing liability on appellants for acts done in conformity with the Board's prior decision appointing the Conservator (see Op. Br. 48). Certainly the contention that ''Appellants' Home Loan Bank Board have themselves waived the immunity from suit of appellant Conservators Ammann and Bramley'' (Ass'n Br. 206) will not bear analysis (Op. Br. 48).

The further contention that the prior orders of the court below are final and *res judicata* on issues of jurisdiction is unfounded, as elsewhere shown (Op. Br. 81-86), and in any event ignores the failure of the complaint and cross-claim to state any claim for relief on the merits. To deny such orders finality on this appeal, it should be added, will in no sense cloud the title to property of former and present borrowers from the Association. The plain fact is that titles to those properties are not and never were clouded as a result of the Conservator's appointment or his acts as such. The claim of cloud results from a refusal to recognize that the Conservator's appointment was

valid until duly set aside. Morever, the judgments entered by the court below in the borrower-intervention proceedings were final as to the intervenors (although the rights of all other parties were "expressly reserved and preserved without prejudice" (Op. Br. 85)) and would, therefore, in no wise be disturbed by any judgment entered in this proceeding.

What has been said sufficiently answers the contention (Ass'n Br. 299-301) that the Board Order No. 2015 seeks to withdraw from the court below issues properly pending before it. There are no such issues, and certainly none which are identical with those involved in the proposed Board hearing. Whether, apart from the pendency of a judicial proceeding, the Board may now consider charges which were previously made the basis of a conservatorship since terminated, obviously goes to the merits of any agency action which may be taken after administrative hearing, and hence may not be considered in advance of such hearing (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41).

The implied suggestion that the Court should ignore the deficiencies in the appellees' pleadings because of the unconscionable length of the appellate record is not only unfounded in principle, but is without basis in fact. Of the 11,500 pages of record (more than 80% of which was designated, unnecessarily, by appellees), the eight appellees' pleadings, prolix as most of them are, occupy about a thousand pages, and the gist of their claims is all contained in their original pleadings of less than 300 pages, set forth in Volumes

I and II (1 R. 2-25, 43-55, 86-99, 260-268, 302-358; 2 R. 564-586).

Finally, the suggestion that appellants seek an order dismissing the action in order to avoid a trial on the merits is certainly without force. The avoidance of unnecessary and protracted litigation is a permissible objective on appeal from an interlocutory injunction. As former Chief Justice Taft observed in *North Carolina R. Co. v. Story,* 268 U.S. 288, 292:

> "By the ordinary practice in equity, as administered in England and this country, an appellate court has the power, on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record, and upon deciding them in favor of the defendant *to dismiss the bill and save both parties the needless expense of further prosecution of the suit.*" (Italics supplied.)

Such dismissal is particularly appropriate in the circumstances of this case. The continued maintenance of the Mallonee action constitutes an intolerable burden and interference with the normal exercise of the Board's supervisory functions. The prior proceedings forcibly suggest that, if the action is permitted to continue, the resulting burden and interference may be voided only by acquiescing in a compromise (16 R. 7435, 7572), deemed by the Board contrary to the public interest (23 R. 10880-2), and embodied in a judgment *in rem* intended to bind the world (16 R. 7440, 7589), thus forever foreclosing any judicial inquiry into the merits of appellees' claims and pre-

cluding even the Association's shareholders from ever calling its management to account on serious charges of breach of trust (16 R. 7589; 21 R. 9585, 9588-9).

The injunction should thus be reversed because the Mallonee action is not maintainable for any purpose. Were the action maintainable, however, there is no such threat of irreparable injury as to warrant the issuance of an injunction. Contrary to appellee's contention, Board Order No. 2015 in no wise threatens the liquidation of the Association. While it directs the Association to show cause why the Board should not enter its order "for such action as it deems necessary or appropriate", including the appointment of the Federal Savings and Loan Insurance Corporation as "receiver" for said Association (Op. Br. App. C 178), it neither authorizes nor directs any agency action in advance of administrative hearing or such judicial review as may be warranted by law. Indeed, the Board order nowhere indicates that even after hearing any action will be taken, much less the appointment of a receiver, but merely gives the Association due notice that the Board hearing will canvas every means of supervisory action, ranging from a minimal supervisory recommendation to the broadest of agency action, as the facts disclosed on hearing may warrant. Appellants are quite mistaken, moreover, in asserting that the Federal Savings and Loan Insurance Corporation, if appointed receiver, may proceed only to "liquidate" the Association. Section 406(b), National Housing Act (Op. Br. App. A 137), specifically authorizes the Corporation, as receiver, to

"operate such Association" or to "liquidate its assets", *inter alia,* "whichever shall appear to be to the best interests of the insured members of the association"; and the Board regulations, though they authorize the appointment of the Corporation as receiver "for the purpose of liquidation" (Op. Br. App. B 149), extend to any receiver the same powers as those prescribed by Section 406(b) of the National Housing Act (*id.* 164), and specifically provide for "returning the association to its management" (*id.* 164).

A reply to all eight appellees' contentions is set forth in further detail below, as they relate to the points made in our opening brief.

ARGUMENT.

I.

THE ALLEGATIONS OF THE MALLONEE ACTION, INSOFAR AS THEY RELATE TO THE VALIDITY OF THE CONSERVATOR'S APPOINTMENT, DO NOT STATE A CLAIM FOR RELIEF WITHIN THE JURISDICTION OF THE COURT BELOW.

A. THE ORDER APPOINTING THE CONSERVATOR IS VALID UNTIL DULY SET ASIDE, AND MAY NOT BE QUESTIONED IN COLLATERAL PROCEEDINGS ATTACKING THE INDIVIDUAL TRANSACTIONS OF THE CONSERVATOR PENDING THE DETERMINATION OF THE VALIDITY OF THE APPOINTMENT; ON TERMINATION OF THE CONSERVATORSHIP NO ACTION IS MAINTAINABLE TO INVALIDATE SUCH INDIVIDUAL TRANSACTIONS OR TO RECOVER DAMAGES ALLEGEDLY CAUSED BY THE APPOINTMENT OR OPERATIONS THEREUNDER.

This point, and the supporting decisions, including *Adams v. Nagle,* 303 U.S. 532; *Spalding v. Vilas,* 161

U.S. 483, and *Gregoire v. Biddle,* 177 F. (2d) 579, are nowhere discussed in any of appellees' briefs.

The sound policy of the rule of immunity from money damage claims arising out of the "abuse" of "discretionary functions" is confirmed by the express exclusion of such claims from the coverage of the Federal Tort Claims Act (28 U.S.C. 2680), with the avowed intention "not to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts. * * * Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." (H. Rept. No. 2245, 77th Cong., 2d Sess., p. 10.)

B. ALL CLAIMS FOR RELIEF BASED ON THE ALLEGED INVALIDITY OF THE CONSERVATOR'S APPOINTMENT ARE BARRED FOR THE FURTHER REASON THAT THE PLAINTIFF SHAREHOLDERS AND THE ASSOCIATION FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY.

Appellees purport to answer this point on grounds which will not bear analysis. It is asserted that the administrative hearing tendered on June 5, 1946 would have been futile because the Board officers had already stated that "under no circumstances would they ever return the business to its founding officers and directors" (Ass'n Br. 19), a contention which the Supreme Court rejected in *Fahey v. Mallonee,* 332 U.S. 245, at 256. It is further asserted that such administrative hearing would have been inadequate because the Board was without power to remove clouds on titles or dispose of the $14,000,000 of assets in

the registry of the court (Sh. Br. 103), which simply ignores that the alleged cloud was created by collateral attacks on the Conservator's appointment and that the assets were deposited in court (after opportunity for administrative hearing was afforded) in connection with such collateral attacks (see Op. Br. 86). The contention that the Board would have had no jurisdiction over Title Service Company, the Association's shareholders and borrowers, proceeds on the same elementary misconception (Sh. Br. 104). The Board, as appellees assert (Sh. Br. 102), could not have considered the validity of the orders dissolving the Los Angeles Bank, but the termination of the conservatorship could have been effected without regard to the Los Angeles Bank matters, and indeed, such was done in January, 1948.

The suggestion that the Association's shareholders may sue because they were not afforded administrative hearing (Sh. Br. 100) is without point. It is certainly novel doctrine that an administrative remedy may be ignored because extended to the corporation but not in terms to its numerous shareholders. The Board Order of June 5, 1946 granting the Association's request for an administrative hearing, it may be added, granted leave to "any person * * * claiming to have an interest in the subject matter involved" to "file a petition for leave to intervene" (Op. Br. 55, n. 10).

Finally, the contention that the Board abandoned the administrative hearing and by Order No. 388 "themselves submitted to the court for decision all

remaining issues" (Ass'n Br. 236), is plainly specious (see *supra*, p. 14).

As the administrative hearing originally tendered in June, 1946, related only to the questions whether the original appointment was warranted and whether the conservatorship should be continued (1 R. 144), the right to such hearing ceased on the termination of the conservatorship. Failure to exhaust the administrative remedy before the time to pursue the same thus expired waived all right to complain in the courts thereafter (*Yakus v. U. S.*, 321 U.S. 414; *Lichter v. U. S.*, 334 U.S. 742, 793-794; *Reconstruction Finance Corp. v. Lightsey*, 185 F. (2d) 167).

C. THE CLAIMS BASED ON THE ALLEGED INVALIDITY OF THE ORDER APPOINTING THE CONSERVATOR ARE NOT MAINTAINABLE FOR THE FURTHER REASON THAT THE ORDER, IF SUBJECT TO JUDICIAL REVIEW, IS VALID AS A MATTER OF LAW ON THE ADMITTED FACTS, AND BECAUSE SUCH ORDER, MOREOVER, IS NOT OPEN TO REVIEW ON THE GROUNDS ALLEGED IN THE COMPLAINT AND CROSS-CLAIMS.

1. The order of May 20, 1946, appointing the conservator is valid as a matter of law on the admitted facts.

This point, set forth on pages 59 to 67 of our opening brief, is ignored by appellees. The fact is that the utterly unwarranted attempt by the Association's directors to vest control in themselves by creation of 16,000 one-dollar share accounts and the voting of funds to defend against their removal for mismanagement plainly establish probable cause for appointment of a temporary conservator, pending full hearing.

2. The order appointing the conservator is not open to judicial review on the grounds alleged in the complaint and cross-claims.

The arguments and authorities discussed on this point at pages 67 to 71 of our opening brief are ignored by appellees. Appellees content themselves with the mere assertion that the Administrative Procedure Act has removed all limitations heretofore existing in the scope of review of discretionary functions (Sh. Br. 61-69).

Section 10 of the Act relating to judicial review, made effective on September 11, 1946 by Section 12, is probably inapplicable to any action pending prior to that date. The Supreme Court has decided all such cases without reference to Section 10 (*United States v. Ruzicka,* 329 U.S. 287 (1946); *Board of Governors of the Federal Reserve System v. Agnew,* 329 U.S. 441 (1947); *Krug v. Santa Fe Pacific Rd. Co.,* 329 U.S. 591 (1947); *Patterson v. Lamb,* 329 U.S. 539 (1947); Attorney General's Manual, Administrative Procedure Act, pp. 93-94). Even if applicable, however, all subsections of Section 10 are subject to its introductory clause, "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion", a qualification which, as its legislative history shows, was intended to include *implied* limitations as well as those expressly provided by statute.[2] Thus, a civil service em-

[2]As originally introduced in both Senate and House, Section 10 provided for judicial review of agency action "except so far as statutes *expressly* preclude judicial review" (italics added) (S. 7, H. R. 1203, 79th Cong., 1st Sess.). The Senate Committee on the

ployee of the Federal Government who alleges unlawful removal from office, can obtain judicial review only of the question whether the procedures of the Civil Service Act were followed (*Levine v. Farley,* 107 F. (2d) 186, App. D. C., 1939, certiorari denied, 308 U.S. 622). In such a case, the provisions of Section 10(e), for example, relating to substantial evidence and to review of abuses of discretion, clearly do not apply.

Were the Administrative Procedure Act applicable, however, and to the full extent claimed by appellees, it would in no wise affect the appellants' immunity from money damage claims arising out of the exercise of a discretionary function (Op. Br. 42-54); or modify the rule requiring exhaustion of the administrative remedy (Op. Br. 54-59); or furnish any answer to appellants' contention that the interim

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Judiciary, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted without specific explanation, but with the observation that the introductory clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded * * * where * * * statutes withhold judicial powers." (Sen. Doc. 248, p. 36.) The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairmen of both Judiciary Committees. The Attorney General said (Sen. Doc. 248, pp. 229-230, 413):

> "Section 10. This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America v. National Mediation Board* (320 U.S. 297); * * *"

order appointing the conservator pending hearing was valid on the admitted facts (see *supra,* p. 22; Op. Br. 59-67).

D. THE MALLONEE ACTION IS IN NO EVENT MAINTAINABLE AGAINST THE INDIVIDUAL NONRESIDENT DEFENDANTS, FOR THE REASON THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE PERSON OF SUCH DEFENDANTS.

1. The court lacks personal jurisdiction over the nonresident defendants in respect to the demands in the shareholders' complaint and Association's cross-claims.

a. *Prior to the termination of the conservatorship, the Mallonee action was not maintainable against the nonresident defendants even for the limited purpose of removing the conservator.*

This point, as set forth in our opening brief at pages 71 to 73, is discussed at length in the briefs of appellees (see e.g., Ass'n Br. 95-121). The argument, if we understand it, is that the action concerns titles to assets in southern California over which the federal courts in the District of Columbia would have no jurisdiction (see Ass'n Br. 104-5), an argument which simply ignores that, at most, the Conservator (not the nonresident Board members) took "possession" of the Association, which could have been restored by an order *in personam* issued by any court with jurisdiction over the person of the Board members or the Conservator. As the point is now of little importance, following the return of the Association to its private management, there is no occasion for any extended reply.

b. *The action is clearly not maintainable against the nonresident defendants for damages or other in personam relief.*

This point, set forth at pages 73 and 74 of our opening brief, is simply ignored by appellees.

2. The so-called cross-claims in interpleader afford no basis for service on the nonresident defendants, even in respect of such cross-claims alone.

This point, set forth on pages 74 to 79 of our opening brief, is discussed at length in the briefs of appellees (see, e.g., Ass'n Br. 122-159; Sh. Br. 44-50; Wal. Br. 13-22). Nowhere, however, in any of their lengthy briefs do the Long Beach Association and its affiliated interests discuss or even mention appellants' contention that all such interpleaders constitute an impermissible collateral attack. At most, it is argued that jurisdiction to entertain a bill of interpleader is not dependent upon the merits of the claims of the alleged adverse claimants (see e.g., Ass'n Br. 154; Wil. Br. 19-20). The cases cited (*Hunter v. Federal Life,* 111 F. (2d) 551, and *Metropolitan Life v. Segaritis,* 20 F. Sup. 739), involving private adverse claimants, do not even remotely suggest that a stakeholder or interested party may by collateral attack call in question the authority of a conservator appointed under the Home Owners Loan Act. Any policy to protect private persons against risk of loss from conflicting claims must yield to the public interest in preventing an "intolerable" interference with the operation of the association pending litigation concerning the validity of the order appointing

the Conservator (Op. Br. 39-41). The rule enforcing such order until duly set aside and forbidding collateral attack thereon adequately protects cross-claimants against such risk, a risk particularly negligible in this case in view of the identity of interests of the private management of the association and the cross-claimants in interpleader. (Op. Br. 75-76).

Could such interpleader be maintained, however, the Court would be in duty bound to direct the stakeholder to acknowledge the authority of the conservator without inquiring into the validity of his appointment or the issues sought to be raised in the shareholders' complaint or Association cross-claims. Such order was suggested by appellants to the court below after the decision in *Fahey v. Mallonee* and rejected (6 R. 2491-2).

What has been said applies with equal force to the Association's motion to impound the $6,300,000 of notes evidencing a loan by the San Francisco Bank to the Association and collateral securing the same, a motion treated by appellees as one of the "interpleaders" on which the jurisdiction of the court below is allegedly based (Ass'n Br. 134). Concededly, the San Francisco Bank has some 300 members, and most of the former members of the Los Angeles Bank have done business with the San Francisco Bank because of favorable terms not available from other sources (20 R. 9346-9). These associations have not only been notified of the litigation, but have either been made parties or served with some of the papers

in the action. If they cannot safely make payments to the San Francisco Bank on loans procured from that bank without running the risk that the Los Angeles Bank may disregard such payments should it prevail in the future litigation, it would be impossible to conduct the business of the Bank or, indeed, its association members. To call in question the authority of the San Francisco Bank pending the outcome of the litigation as to its status is, therefore, an "intolerable" interference with the policy of the Federal Home Loan Bank Act (*Adams v. Nagle,* 303 U.S. 532, 540).

What has been said concerning the so-called "interpleaders", it should be emphasized, is sufficient to establish not only that none meet the requirements of 28 U.S.C. 1335 for extraterritorial service, but also that they each fail to state any claim for relief, and are hence likewise not maintainable under Rule 22 of the Federal Rules of Civil Procedure.

3. **The nonresident defendants at no time submitted themselves to the jurisdiction of the court below.**

This point, set forth in our opening brief at pages 79 to 81, is discussed at length by appellees (see e.g., Ass'n Br. 80-95), but the argument ignores that the Federal Rules of Civil Procedure abolish the distinction between a "special" and "general" appearance (Rule 12(b)) and permit a defendant to join an objection to jurisdiction with any defense on the merits. The cases on which appellees rely were decided before the adoption of the Federal Rules of Civil Procedure and are not controlling (*Blank v.*

Bitker, 135 F. (2d) 962; *Phillips v. Baker,* 9 Cir., 121 F. (2d) 752; *Orange Theatre Corp. v. Ray Herstz Am. Corp.,* 3 Cir., 139 F. (2d) 871; 2 *Moore's* Fed. Proc. (2d Ed.) 2262, et seq.; *Simkins* Federal Practice, (3rd Ed.) Sec. 34, p. 47, et seq.). A defendant may now join a claim for affirmative relief without waiving objection to jurisdiction over his person; Rule 12(b) includes a "counter-claim" as a "defense", thus plainly indicating that prayer for affirmative relief is covered by the provision that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion" (*Saddler v. Pennsylvania Ref. Co.,* 33 F. Supp. 414; *Blank v. Bitker, supra*).

The appellants, however, neither sought nor obtained any affirmative relief. The election of Association directors *after* the return of the Association to it former management, directed by the District Court on its own initiative, was in no sense the same as an election *before* such return, as the Board had directed; the bond "volunteered" (18 R. 8318) by the Association was an ordinary incident of such order, which order the appellants duly resisted; and the mere inquiry by appellants' counsel whether it would be "proper to suggest" that the order include a provision validating the acts of the conservator (22 R. 10332), hardly amounts to a claim for affirmative relief where the appellants were resisting the removal of the Conservator altogether. Appellants did consent to the appointment of Mr. Walker as Special Master, but only after their objections to the removal of the

Conservator were overruled; the appointment of such Special Master was most certainly not relief prayed for or requested by appellants.[3]

E. NONE OF THE ORDERS HERETOFORE ENTERED BY THE COURT BELOW PRIOR TO THE INJUNCTION ON APPEAL AFFORD ANY BASIS FOR FURTHER MAINTENANCE OF THE MALLONEE ACTION.

1. None of such orders are res judicata.

This point, discussed at pages 81 to 86 of our opening brief, is argued at length by appellees (see e.g., Ass'n Br. 106-7, 111, 160-80; Sh. Br. 72-93; T.S. Br. 8-12). Notwithstanding their lengthy and labored arguments, however, appellees nowhere furnish any answer to the arguments set forth in our opening brief on this point (Op. Br. 81-86; see also *Hill v. United States,* 298 U.S. 460, 466; *Carbone v. Superior Court,* 18 Cal. (2d) 839, 117 Pac. (2d) 872; *Bannon v. Bannon,* 270 N.Y. 484, 1 N.E. (2d) 975, 105 A.L.R.

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[3]The further contention that the Board is subject to service in California by reason of "doing business" in that state through its "local agents", including the Federal Home Loan Bank of San Francisco, the Federal Savings and Loan Insurance Corporation, and various Federal Savings and Loan Associations (Ass'n Br. 181-203), is plainly specious. The sufficient answer, all else aside, is that doing business is the basis for service only in the case of a "corporation" (28 U.S.C. 1391(c)) or partnership (FRCP Rule 4(d)); the Bank Board and its members answer to neither description. Rule 4(f) otherwise limits service to the territory of the state in which the district court is held except "when a statute of the United States" otherwise provides, and the only such statutes invoked are Section 1655 (formerly 118) of Title 28 U.S.C. and Section 1335 thereof, neither of which is applicable (see *supra,* p. 28). It may be noted, in passing, that counsel for the Association himself filed an affidavit that the Federal Savings and Loan Corporation "has no officers, agents or representatives, within this State of California, authorized to accept service", as a basis for an order for service on "absent defendants" (11 R. 5301-2).

1401). While the District Court's prior orders may possibly be treated as the "law of the case" in the same court, they have, of course, no such effect on appeal (*Diaz v. Patterson,* 263 U.S. 399; *Messinger v. Anderson,* 225 U.S. 436; *King v. W. Va.,* 216 U.S. 92; *Pan American Railroad Co. v. Napier Shipping Co.,* 166 U.S. 280).

None of the cases cited by appellees furnish any support for their contentions. Most of them involve a collateral attack upon a final judgment entered in a wholly separate and independent action (*Stoll v. Gottlieb,* 305 U.S. 165; *Chicot, etc. v. Baxter State Bank,* 308 U.S. 371; *Treinies v. Sunshine Mining Co.,* 308 U.S. 66; *Dugas v. American Surety Co.,* 300 U.S. 414; *American Surety Co. v. Baldwin,* 287 U.S. 156; *Baldwin v. Iowa Traveling, etc.,* 283 U.S. 522). Two others involve the finality for purposes of appeal of a judgment entered prior to the termination of the final action (*Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507; *Cohen v. Beneficial Industrial Corp.,* 337 U.S. 541), in which no question of *res judicata* was involved and which in no event could have any bearing on the effect as *res judicata* of an interim order based solely on affidavits and other evidence "not so extensive as at the trial of the action" (*Carbone v. Superior Court,* 18 Cal. (2d) 768, 772, 117 Pac. (2d) 872, 874). Finally, *Walling v. Miller,* 138 F. (2d) 629, involved only the question whether a consent judgment was subject to appeal on the ground that the plaintiff was without standing to sue, the court holding that no such appeal would lie as the objection was not jurisdictional.

There is likewise no merit in the contention that the Supreme Court, in refusing to direct dismissal in *Fahey v. Mallonee, supra,* required that the case be tried (Ass'n Br. 162-3). The Supreme Court commonly declines to decide novel issues not passed upon by the courts below, as confirmed by *N.L.R.B. v. Pittsburgh S.S.,* 337 U.S. 656, quoted in Wil. Br. 49-50; *Rosenthal v. N.Y. Life Ins. Co.,* 304 U.S. 263; *Cities Service Oil Co. v. Dunlop,* 308 U.S. 208; *U. S. v. Knight,* 336 U.S. 505; *U. S. v. Interstate Commerce Comm.,* 337 U.S. 426. In reversing "without prejudice to any other administrative or judicial proceedings which may be warranted by law" (*Fahey v. Mallonee,* 332 U.S. at 257-8), the Supreme Court merely left open the question whether judicial review might be had, which question it had declined to decide in the absence of any rulings thereon by the court below. The court below properly construed the Supreme Court's opinion as requiring him, "as a judge of this court, to pass upon the matters which were raised on the motions to dismiss and which were not decided by the Supreme Court" (22 R. 10283).

From the foregoing it clearly appears that none of the prior orders are *res judicata* of any issue on this appeal. What the appellees really contend, however, is that by reason of the termination of the conservatorship by Board and Court order in January, 1948, the Board was thereafter without power to take any future supervisory action which might disturb the control of the Long Beach Association's private management. A sufficient answer is that the Board order now on appeal contemplates only a hearing and pro-

vides for no other administrative action of any kind. A further answer is that neither Board Order No. 388 of January 17, 1948 nor the Court Order of January 23, 1948, enforcing the return, contains any findings as to the charges made in the original order of appointment, or in any way touches the Board's power to exercise supervisory control, including the appointment of a conservator or receiver, for the future. The Long Beach Association is in no different position for this purpose than other associations for which no conservator has ever been appointed in the past.

2. **The deposit in court of some $14,000,000 of assets pursuant to certain of such orders likewise affords no basis for the further maintenance of the Mallonee action or any cross-claims therein.**

The appellants' contention that the assets now on deposit in the registry of the court are improperly retained and should be released, set forth at pages 86 to 88 of our opening brief, is nowhere answered by appellees, save possibly in the untenable argument that the orders directing such deposits are now final and *res judicata*.

II.

THE COMPLAINTS IN THE CONSOLIDATED ACTIONS, INSOFAR AS THEY RELATE TO THE ORDERS OF MARCH 29, 1946, STATE NO CLAIM FOR RELIEF WITHIN THE JURISDICTION OF THE FEDERAL COURTS.

These appellants quite agree with the contention of the appellees, the former Los Angeles Bank, that there is no identity of issues between the proposed

Board hearing and the Los Angeles action as pleaded by this appellee (L.A. Br. 10-12). Indeed, we so asserted in our opening brief (Op. Br. 109).

The plaintiff shareholders and the Association, however, have drawn their allegations in the *Mallonee* action so as to render inseparable those relating to the orders of March 29, 1946, dissolving the Los Angeles Bank, and those relating to the order of May 20, 1946 appointing the conservator. The Association specifically alleges that the allegations concerning all the orders of both dates are "inseparable" (7 R. 3311), and the court below so found in granting the injunction on appeal (24 R. 11151).

A. THE FINDING OF THE HOME LOAN BANK ADMINISTRATION THAT THE ORDERS IN CONTROVERSY WOULD "AID THE EFFICIENT AND ECONOMICAL ACCOMPLISHMENT OF THE PURPOSES OF THIS ACT", THOUGH MADE WITHOUT HEARING, IS NOT OPEN TO JUDICIAL REVIEW.

The appellants' contention that there can be no judicial review of the Board's finding that the orders in controversy would "aid the efficient and economical accomplishment of the purposes of this Act" (Op. Br. 90-96) is nowhere answered in any of appellees' briefs, apart from the unfounded contention that the Administrative Procedure Act confers jurisdiction to review the exercise of any administrative discretion.

The principal contention advanced both by the Long Beach Association and its affiliates and the Los Angeles Bank is that the denial of a hearing violated due process. The argument ignores that the Bank is not a private person incorporated on the application of private individuals, but a *public* agency

created by the Board pursuant to the express direction of Section 3 of the Federal Home Loan Bank Act, with its original directors mere nominees of the Board (Sec. 7(c), Act of July 22, 1932, 47 Stat. 730); and that the unqualified right to dissolve was reserved by the Act to the Board and the Congress under Section 25. The Bank was thus subject to dissolution without hearing as freely as municipal corporations may be dissolved by a state (*State v. City of Beloit,* 42 N.W. 110, 111, 74 Wis. 267; *State v. Hightower,* 36 S.E. (2d) 649, 650, 226 N.C. 62; *Southland Gasoline Co. v. Bayley,* 319 U.S. 44; *Comrs. of Laramine County v. Comrs. of Albany County,* 92 U.S. 307; *Mt. Pleasant v. Beckwith,* 100 U.S. 514; *Hunter v. Pittsburgh,* 207 U.S. 161; *Pawhuska v. Pawhuska Oil & Gas Co.,* 250 U.S. 394; *Trenton v. New Jersey,* 262 U.S. 182, 129 A.L.R. 1471; *McDonough v. Goodall,* 13 Cal. (2d) 741, 91 Pac. (2d) 1035; *School District v. Callahan,* 237 Wis. 560, 135 A.L.R. 1081).

None of the appellees, moreover, attempt to answer the appellants' contention that the Bank is estopped to question the validity of the act authorizing dissolution without hearing (Op. Br. 90-1), or to distinguish the controlling analogy of the valid statute authorizing the Comptroller of the Currency to appoint receivers for national banks and to assess their shareholders without any hearing (see Op. Br. 90-1, n. 16). The appellees' contention that the word "find" used in Section 26 implies a statutory duty to grant a hearing as a condition of dissolution is without substance (*Southland Gasoline Co. v. Bayley,* 319

U.S. 44; *Eastern Airlines v. Civil Aeronautics Board,* 185 F. (2d) 426; *State v. City of Beloit,* 74 Wis. 267, 42 N.W. 110; *State v. Hightower,* 226 N.C. 62, 36 S.E. (2d) 649). The cases cited by appellees to the contrary (L. A. Br. 18) are not in point. In two of them (*Abrahams v. Dougherty,* 60 Cal. App. 397, 401; *Mt. Carmel Public Utility & Service Co. v. Public Utilities Comm.,* 130 N.E. 693), a hearing was deemed required as a matter of due process independently of the directive to make a "finding". In the third (*California Lighting Comm. v. Mahn,* 59 Cal. App. (2d) 322, 324-5), the court held a mere "investigation" of the facts sufficient.

B. NEITHER THE FORMER LOS ANGELES BANK NOR THE COMPLAINANT ASSOCIATIONS HAVE ANY STANDING TO SUE.

This point (Op. Br. 96-100) is ignored in the briefs of the Long Beach Association and its affiliates. The arguments advanced by the Los Angeles Bank (L. A. Br. 22-23) are sufficiently answered in our opening brief.

C. THE COURT BELOW LACKED JURISDICTION OVER INDISPENSABLE PARTIES.

1. The Home Loan Bank Board and its members are indispensable parties to the maintenance of the Bank action.

The attempted answer to the appellants' contention (Op. Br. 100-102) is, in essence, that no parties are indispensable to an action *in rem* (see e.g., Ass'n Br. 250-254; L. A. Br. 24). Nowhere is there any answer to appellants' contention that the action, in the view most favorable to appellees, is one to enforce a con-

tract, the bank charter, a proceeding to which all parties to the contract are indispensable parties (Op. Br. 100-3), and for "reactivation" of the Los Angeles Bank (Sh. Br. 17), which requires the personal "approval" of the Bank Board.

2. Valid service on the Board or its members was not had.

Nowhere in appellees' briefs is there any answer to the appellants' contention (Op. Br. 101-3) that the relief prayed for requires a judgment *in personam* and hence is not obtainable under former Section 118 (now 1655), Title 28, U.S.C.

D. THE SUIT IS ONE AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED.

The appellants' contention that the "reactivation" of the Los Angeles Bank requires *affirmative* official action to obtain the relief prayed for and hence is an unconsented suit against the United States (Op. Br. 104-6) is nowhere answered. While the Administrative Procedure Act is invoked, the contention that this Act is not intended to abrogate the historic immunity of the sovereign from suit is wholly ignored.

E. THE ORDERS OF MARCH 29, 1946 DISSOLVING THE LOS ANGELES BANK, IF OPEN TO REVIEW ON THIS PROCEEDING. ARE VALID ON THEIR FACE.

Appellants' contention that the complaints fail to negative the presumptive existence of facts to support the orders dissolving the Los Angeles Bank in the interest of the more "efficient and economical accomplishment of the purposes of the act" is nowhere answered.

The sole argument is that of the Los Angeles Bank that the Board failed to follow the procedure for dissolution prescribed by Section 26 (L.A. Br. 29-34). A sufficient answer is that, "where a statute contains a grant of power enumerating certain things which may be done, and also a general grant of power which, standing alone, would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive" (*Springer v. Philippine Islands,* 277 U.S. 189, 206; *Gibbons v. Ogden,* 9 Wheat. 1).

In any event, the former Federal Home Loan Bank of Los Angeles was "liquidated" and its stock "paid off and retired" within the meaning of Section 26 of the Federal Home Loan Bank Act. The administrative orders admittedly "dissolved" the Bank. The provision in the accompanying orders for payment of the Bank's shareholder members in stock of the San Francisco Bank constitutes payment within the meaning of Section 26. To have made payment in cash would have required the dissolution of the Federal associations formerly members of the Los Angeles Bank, since until 1950 such associations were required to be members of some Federal Home Loan Bank (see 5(f) Home Loan Owners Act; Op. Br. App. A 130), and stock ownership is a condition of Bank membership (Federal Home Loan Bank Act, Sec. 6; Op. Br., App. A, 115-116). Section 26, moreover, expressly contemplated a liquidation without any cash distribution, in making specific provision that "any

other Federal Home Loan Bank may, with the approval of the Board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part". The argument that this provision requires the initial consent of such "other" bank is untenable. Congress could not have intended to condition the effective dissolution of an unneeded bank on securing consent of another bank. In any event, the first amended complaint of the Association's shareholders specifically alleges that the Portland Bank redesignated as the "Bank of San Francisco" subsequently ratified the Board orders of consolidation (7 R. 3025).

Finally, in the case of such public corporations, the term "reorganization" as used in Section 26, includes a liquidation of one bank and the transfer of its assets and liabilities to any existing bank (cf. *Wheeler S. District v. Hawley,* 18 Wash. (2d) 37, 137 Pac. 1010.) In the context of Section 26, the term "reorganization" must be deemed to include any procedure which involves the continuation of the business of the dissolved bank in a different corporate form.

III.

QUITE APART FROM THE FOREGOING, THE INJUNCTION SHOULD NOT HAVE BEEN ISSUED.

A. THE COURT BELOW LACKED JURISDICTION OVER THE PERSONS OF THE DEFENDANT HOME LOAN BANK BOARD MEMBERS, WITHOUT WHICH THE COURT LACKED POWER TO ISSUE THE INJUNCTION.

Appellees nowhere deny that jurisdiction *in personam* is required for the issuance of an injunction to restrain the nonresident Board members from conducting an administrative hearing. Jurisdiction to issue such relief *in personam* cannot be acquired, of course, under former Section 18 (now 1655) of Title 28 U.S.C., nor under the interpleader statutes for the purpose involved (*Hagen v. Central Avenue Dairy,* 180 F. (2d) 502). Appellees are thus reduced to their unfounded contention that the Board members submitted to the court's jurisdiction over their persons by adopting Order No. 388 of January 17, 1948.

B. THE ISSUES FOR CONSIDERATION AT THE PROPOSED BOARD HEARING AND ITS OBJECTS WERE NOT THE SAME AS THOSE INVOLVED IN THE PENDING MALLONEE AND LOS ANGELES ACTIONS.

This point is nowhere answered save for the mere unsupported assertion that "everyone of the four grounds of Order 2015 directly affects matters pending in issue before the District Court" (Ass'n Br. 43).

C. THE COURT'S FINDING THAT ITS PROCESS IS AVAILABLE TO THE BOARD TO PROTECT THE PUBLIC INTEREST CONFIRMS THAT THE INJUNCTION WAS IMPROVIDENTLY ISSUED.

This point is ignored in appellees' briefs.

The statement that the supervisory examination "as of" July 16, 1949 "disclosed not one criticism of the Association or the conduct of its business" (Ass'n Br. 278) does not warrant comment, since the question of the method in which the Association's business was conducted was initially one for the Board's determination and not for the court below. It may be noted, however, that the cross-examination of Turner showed that this July examination did not include inspection of any records outside of the Association itself (24 R. 10991-3, 11047); the rejected appellants' exhibits A, B and C were offered to prove that such outside examination was required to test the validity of the records of the Association with regard to loans to dummies or the compensation, if any, paid to officers as the price of a loan from the Association (24 R. 10991-3, 11047, 11060).

D. THE ORDERING OF AN ADMINISTRATIVE INVESTIGATION AND HEARING ALONE DOES NOT CONSTITUTE IRREPARABLE INJURY.

The arguments on this point in appellees' briefs warrant no further answer.

CONCLUSION.

It is therefore respectfully submitted that the order of injunction should be reversed and the action dismissed.

Respectfully submitted,

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